United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

OCTOBER TERM, 1903.

No. 1339.

No. 13, SPECIAL CALENDAR.

ELLWOOD O. WAGENHURST, JOHN E. REYBURN, AND JOHN K. LITTLE, APPELLANTS,

vs.

ELIAS WINELAND.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

INDEX.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., SEPTEMBER 18, 1903.

In the Court of Appeals of the District of Columbia.

ELLWOOD O. WAGENHURST ET AL., Appellants,
vs.
ELIAS WINELAND. } No. 1339.

a Supreme Court of the District of Columbia.

ELIAS WINELAND, Complainant,
vs.
ELLWOOD O. WAGENHURST, ELLIS H. Roberts, Treasurer of the United States of America and *ex-Officio* Commissioner of the Sinking Fund of the District of Columbia; John E. Reyburn, John K. Little, and Robert M. Moore, Defendants. } No. 23352. In Equity.

UNITED STATES OF AMERICA, *District of Columbia*, } *ss*:

Be it remembered, that in the supreme court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:—

1 *Original Bill.*

Filed June 7, 1902.

In the Supreme Court of the District of Columbia.

ELIAS WINELAND
vs.
ELLWOOD O. WAGENHURST, ELLIS H. ROBERTS, Treasurer of the United States of America and *ex-Officio* Commissioner of the Sinking Fund of the District of Columbia; John E. Reyburn, John K. Little, and Robert M. Moore. } Equity. No. 23352, Docket No. 52.

The bill of complaint of Elias Wineland against Ellwood O. Wagenhurst and others, in chancery exhibited.

Your complainant respectfully states as follows:

* * * * * * *

2. That the defendants are also citizens of the United States of America, and the defendants Ellwood O. Wagenhurst and Ellis H.

Roberts are residents of the District of Columbia. The defendant Ellwood O. Wagenhurst is sued in his own right, and the defendant Ellis H. Roberts is sued as the Treasurer of the United States of America, and *ex-officio* commissioner of the sinking fund of the District of Columbia. The defendants John E. Reyburn and John K. Little are residents of the city of Philadelphia, in the State of Pennsylvania, and are sued in their own rights, as hereinafter more fully set forth. The defendant Robert M. Moore is a resident of the city of Havana, in the island of Cuba, as your complainant is informed and believes, and is sued in his own right.

* * * * * * *

2 The premises considered, your complainant respectfully prays as follows:

1. That process may issue requiring the defendants and each of them to appear and answer the exigencies of this bill of complaint, but not under oath, oath to the answer to each of them being hereby expressly waived.

2. That the defendants and each of them may be required to make full and complete discovery in the premises, and especially as to their alleged claims, notice or record thereof, and all material details relating thereto.

3. That the absolute ownership of your complainant of the whole of the said retained moneys, bonds and interest may be decreed, declared and confirmed by this court.

4. That the defendants Ellwood O. Wagenhurst, John E. Reyburn, John K. Little and Robert M. Moore and each of them may be enjoined *pendente lite* and perpetually from in any manner interfering or intermeddling with the said retained moneys, bonds or interest, or any part thereof, and especially that they and each of them may be likewise enjoined from collecting or receiving either directly or indirectly of any person either personally or by agent or attorney the said retained moneys, bonds or interest or any part thereof, and that they and each of them may be likewise enjoined from executing or delivering any receipt, voucher or acquittance for the purpose of withdrawing the said moneys, bonds and interest or any part thereof from the United States Treasury.

5. That the defendant Ellis H. Roberts, Treasurer of the United States and commissioner as aforesaid may be requested to furnish this court with certified copies of the said letters received by him from the defendants John E. Reyburn and John K. Little hereinbefore referred to in paragraph 24 of this bill of complaint,
3 together with certified copies of the answers of the said Treasurer and commissioner to the said letters.

6. That a receiver or receivers may be appointed by this court to collect, receive and hold the said retained moneys, bonds and interest, subject to the order of this court and its final decree in the premises, and that the defendants to this bill of complaint and each of them, except the defendant Ellis H. Roberts, may be directed and required to execute and deliver all such receipts, vouchers, acquit-

tances and other instruments as may be necessary to enable, authorize and empower the said receiver or receivers to collect or receive and withdraw the said retained moneys, bonds and interest from the said Treasurer and commissioner and the Treasury Department of the United States.

7. That your complainant may have such other and further relief in the premises as the court may deem just and proper.

And, as in duty bound, your complainant will ever pray, etc.

The defendants to this bill of complaint are Ellwood O. Wagenhurst, Ellis H. Roberts, Treasurer of the United States of America and *ex-officio* commissioner of the sinking fund of the District of Columbia, John E. Reyburn, John K. Little and Robert M. Moore.

ELIAS WINELAND.

THOMAS M. FIELDS,
Solicitor for Complainant.

* * * * * * *

4 *Final Decree.*

Filed Apr. 7, 1903.

In the Supreme Court of the District of Columbia.

ELIAS WINELAND
v.
ELLWOOD O. WAGENHURST ET AL. } Equity. No. 23352.

This cause duly came on to be heard at this term of the court upon the record and proceedings herein, and was submitted to and considered by the court; and it appearing to the court that an order was passed herein during the last term of this court, on March 23, 1903, taking the bill of complaint and the allegations thereof for confessed as against the defendants Ellis H. Roberts; and it further appearing to the court that another order was passed herein during the last term of this court, on April 2, 1903, taking the bill of complaint and the respective allegations thereof for confessed as against the respondents Ellwood O. Wagenhurst, John E. Reyburn and John K. Little; and it further appearing to the court that the said orders *pro confesso* ever since have been and still are in full force and effect; and it still further appearing to the court that on April 2, 1903, the respondent Robert M. Moore duly waived process and appeared in this cause, and consented to any decree which the court may think proper to pass in this cause for the purpose of establishing the complainant's ownership of the retained moneys involved in this suit and to enable the complainant to collect and receive the same:

Thereupon it is, this seventh day of April, A. D. 1903, by this court and the authority thereof, hereby adjudged, ordered and
5 decreed as follows, after full consideration of the entire record and proceedings herein:

1. That the said orders *pro confesso* be and they hereby are confirmed and made absolute and final.

2. That the complainant Elias Wineland is now, and ever since December 21, A. D. 1898, has been, the sole and absolute owner in his own right, subject only to the conditions of retention, of the whole and all of the moneys, bonds and interest arising and retained under contracts Nos. 2361 and 2390 between the respondents Robert M. Moore and Ellwood O. Wagenhurst, as copartners trading under the firm name of R. M. Moore & Co., and the District of Columbia; which said retained moneys, bonds and interest are now, and before December 21, A. D. 1898, were, and ever since have been, in the hands of the defendant Ellis H. Roberts, Treasurer of the United States of America and *ex officio* commissioner of the sinking fund of the District of Columbia, and which are fully described in the bill of complaint and exhibits herein; and the sole and absolute ownership of the complainant in his own right, subject only to the conditions of retention, of the whole and all of the said retained moneys, bonds and interest, is hereby decreed, declared and confirmed.

3. That the respondents Ellwood O. Wagenhurst, John E. Reyburn, John K. Little and Robert M. Moore have not any valid right, title, interest, estate, claim, or demand whatever in or to the said retained moneys, bonds and interest, or any part thereof, as against the complainant.

4. That the respondents Ellwood O. Wagenhurse, John E. Reyburn, John K. Little and Robert M. Moore be and they hereby are perpetually enjoined and restrained from interfering or intermeddling in any manner whatsoever with the said retained moneys, bonds and interest, or any part thereof; and likewise from collecting or receiving the same, or any part thereof.

5. That the complainant recover against the respondents
6 Ellwood O. Wagenhurst, John E. Reyburn, John K. Little and Robert M. Moore the costs of this suit, to be taxed by the clerk of this court, for which costs the complainant shall have execution as provided by law.

6. That the clerk of this court transmit a duly certified copy of this decree to the said Ellis H. Roberts.

By the court:

A. B. HAGNER,
Associate Justice.

Order Allowing Appeal, etc.

Filed Apr. 8, 1903.

In the Supreme Court of the District of Columbia.

ELIAS WINELAND
v.
ELLWOOD O. WAGENHURST ET AL. } Equity. No. 23352.

Come now the defendants, Ellwood O. Wagenhurst, John E. Reyburn and John K. Little, and, in open court, pray an appeal to the

Court of Appeals of the District of Columbia from the decree of this court herein made on yesterday, April 7, 1903.

Whereupon, it is, by the court, this 8th day of April, A. D. 1903, ordered that the said appeal be allowed and that the appeal bond to cover costs in the said appeal be, and the same hereby is, fixed at $100.00 *dollars.*

A. B. HAGNER,
Asso. Justice.

7 *Bond on Appeal.*

Filed Apr. 13, 1903.

In the Supreme Court of the District of Columbia.

ELIAS WINELAND, Complainant,
vs.
ELLWOOD O. WAGENHURST ET AL. } No. 23352. In Equity.

Know all men by these presents, that we, Ellwood O. Wagenhurst, John E. Reyburn and John K. Little, as principals, and the United States Fidelity and Guaranty Company as surety, are held and firmly bound unto the above named Elias Wineland in the full sum of one hundred dollars to be paid to the said Elias Wineland, his executors, administrators, successors, or assigns. To which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors, administrators, successors, and assigns, firmly by these presents.

Sealed with our seals, and dated this 8th day of April, in the year of our Lord one thousand nine hundred and three.

Whereas the above-named Ellwood O. Wagenhurst, John E. Reyburn and John K. Little have prosecuted an appeal to the Court of Appeals of the District of Columbia, to reverse the decree rendered in the above suit by the said supreme court of the District of Columbia:

Now, therefore, the condition of this obligation is such, that if the above-named Wagenhurst, Reyburn and Little shall prosecute their said appeal to effect, and answer all costs if they shall fail to make good their plea, then this obligation shall be void; otherwise, the same shall be and remain in full force and virtue.

ELLWOOD O. WAGENHURST. [SEAL.]
JOHN E. REYBURN. [SEAL.]
JOHN K. LITTLE. [SEAL.]
THE UNITED STATES FIDELITY & GUARANTY CO.,
By J. S. SWORMSTEDT,
Attorney in Fact. [SEAL.]

Sealed and delivered in presence of—

—— ——.

Approved the 11th day of April, 1903.

A. B. HAGNER,
Justice, S. C. D. C.

8 *Order Authorizing Payment into Registry.*

Filed May 4, 1903.

In the Supreme Court of the District of Columbia.

ELIAS WINELAND
v.
ELLWOOD O. WAGENHURST ET AL. } Equity. No. 23352.

It appearing to the court that the final decree passed in this cause on April 7, 1903, has not been superseded or stayed by the appeal and cost bond of the respondents Ellwood O. Wagenhurst, John E. Reyburn and John K. Little, and that execution of the said decree has not been otherwise superseded or stayed in any manner whatever;

And it further appearing to the court that the other respondents have not appealed from the said decree, and that the time allowed by law to supersede or stay the said decree and execution thereof has fully expired, and that the complainant is entitled to have the said decree executed immediately and notwithstanding the said appeal;

Thereupon it is, this fourth day of May, A. D. 1903, by this court and the authority thereof, hereby ordered that the respondent Ellis H. Roberts, Treasurer of the United States and *ex-officio* commissioner of the sinking fund of the District of Columbia, be and he is hereby authorized to pay or deliver forthwith into the registry of this court, through its clerk, to await further order of this court, all of the moneys and bonds and interest awarded to the complainant Elias Wineland by the aforesaid decree; and such payment or delivery of the said moneys and bonds and interest by the said Ellis H. Roberts to the clerk of this court under this order and the
9 said decree shall be a full, complete and absolute acquittance, release and discharge of the said Ellis H. Roberts for the whole and every part of the said moneys and bonds and interest, and shall constitute an absolute bar to any proceedings against the said Ellis H. Roberts for or on account of the whole or any part of the said moneys and bonds and interest.

By the court:

ASHLEY M. GOULD, *Justice.*

Motion to Nullify Order of May 4, 1903.

Filed May 6, 1903.

In the Supreme Court of the District of Columbia.

ELIAS WINELAND
v.
ELLWOOD O. WAGENHURST ET AL. } Equity. No. 23352.

Come now the defendants, Ellwood O. Wagenhurst, John E. Reyburn and John K. Little, by their solicitors, and show to the court that the appeal in this cause was duly docketed in the Court of Appeals of the District of Columbia on the 27th day of April 1903, where the cause is now pending, awaiting a hearing by that court; that the order herein made by this court on the 4th day of May 1903 at the instance of the solicitor for the complainant was made without notice of any kind to the defendants, or their solicitors; that the said order is not a writ of execution to be levied in enforcement of the decree of April 7, 1903, (which decree is now in the Court of Appeals for review), but an order which seeks to change the custody of the property or fund in litigation without any necessity for such change and without authority in this court, under the circumstances, to order such change.

Wherefore, they, the defendants aforesaid, move the court for an order in the premises which shall have the effect of vacating and annulling the order herein made on May 4, 1903, which order does not leave the decree of April 7, last, to be enforced by any of the known writs of execution used to give effect to the decrees of a court, but seeks, by new and affirmative action, granted on an *ex parte* application, to disturb the present safe possession of property while the cause which involves the ownership of the property is depending on appeal in the Court of Appeals.

J. ALTHEUS JOHNSON,
ELLWOOD O. WAGENHURST,
Solicitors for Defendants Wagenhurst, Reyburn, & Little.

Service of copy of foregoing motion acknowledged this sixth day of May, 1903, for hearing on May 7, 1903, at 10 a. m.

THOMAS M. FIELDS,
Solicitor for Complainant.

11 *Order Overruling Motion.*

Filed May 7, 1903.

In the Supreme Court of the District of Columbia.

ELIAS WINELAND
v.
ELLWOOD O. WAGONHURST ET AL. } Equity. No. 23352.

Upon consideration of the motion of the respondents Ellwood O. Wagenhurst, John E. Reyburn, and John K. Little, filed herein May 6th, 1903, for an order vacating or annul-ing the order passed in this cause on May 4, 1903, and after argument by counsel for the said respondents and the complainant, it is, this seventh day of May, 1903, ordered that the said motion be and it is hereby overruled with costs.

By the court:

ASHLEY M. GOULD, *Justice.*

Order Fixing Bond for Appeal.

Filed May 7, 1903.

In the Supreme Court of the District of Columbia.

ELIAS WINELAND
v.
ELLWOOD O. WAGENHURST ET AL. } Equity. No. 23352.

From the order of the court this day made overruling the motion asking for an order that should cancel or nullify the order of
12 May 4, 1903, as also from the said order of May 4, 1903, the defendants Wagenhurst, Reyburn and Little, having noted in open court an appeal to the Court of Appeals of the District of Columbia and asked the court to fix the penalty of a bond to be given by the said defendants to cover the costs of the said appeal and to operate as a supersedeas of the said order of May 4th, it is, by the court, this 7th day of May, 1903, ordered that the penalty of the bond for the appeal so noted be, and the same hereby is, fixed at $100.

ASHLEY M. GOULD, *Justice.*

Rule to Show Cause.

Filed May 11, 1903.

In the Supreme Court of the District of Columbia.

ELIAS WINELAND
v.
ELLWOOD O. WAGENHURST. } Equity. No. 23352.

Upon consideration of the petition of the complainant, Elias Wineland, filed herein this day, it is, this eleventh day of May, A. D. 1903, ordered that Ellwood O. Wagenhurst and J. Altheus Johnson are hereby commanded and required to appear at the bar of this court on Monday, May 18th, A. D. 1903, at ten (10) o'clock a. m., and then and there to show cause, if any they have, why they and each of them shall not be adjudged in contempt of this court, and punished accordingly, for the acts done by them as fully set forth in the aforesaid petition; provided that a copy of this order be served this day on each of them.

By the court:

ASHLEY M. GOULD,
Associate Justice.

13 Endorsed: Certified to Mr. Justice Hagner for hearing. Ashley M. Gould, justice.

Rule to Show Cause.

Filed May 13, 1903.

In the Supreme Court of the District of Columbia.

ELIAS WINELAND
v.
ELLWOOD O. WAGENHURST ET AL. } Equity. No. 23352.

Upon consideration of the petition of the complainant, Elias Wineland, this day filed herein, it is, this 13th day of May, A. D. 1903, ordered that the defendant Ellis H. Roberts, Treasurer of the United States and *ex officio* commissioner of the sinking fund of the Disrict of Columbia, show cause on or before Monday, May 18, A. D. 1903, at ten (10) o'clock a. m., why he shall not be required to pay or deliver forthwith to the said Elias Wineland, or into the registry of this court for the latter's use and benefit, the moneys, bonds and interest awarded to the said Elias Wineland by the final decree passed herein on April 7, A. D. 1903; provided that a copy of the said petition and this

order be served upon the said Ellis H. Roberts at least two (2) clear days before the aforesaid return day hereof; and provided further that a copy of the said petition and this order be likewise served upon the attorney of the United States in and for the District of Columbia.

By the court:

A. B. HAGNER, *Justice.*

Endorsed: Served copy of the within order on J. F. Meline, acting Treasurer of the United States, May 13, 1903. Aulick Palmer, marshal.

14 *Response of Johnson & Wagenhurst to Rule to Show Cause.*

Filed May 18, 1903.

In the Supreme Court of the District of Columbia.

ELIAS WINELAND
vs.
ELLWOOD O. WAGENHURST ET AL. } No. 23352, Equity Doc. —.

Response to rule to show cause.

J. Altheus Johnson and Ellwood O. Wagenhurst, appearing in response to the order herein made on the 11th inst. requiring them to show cause why they should not be adjudged in contempt of court for what they did and said at the Treasury Department in regard to the order which was passed herein on the 4th inst., respectfully show as follows:

The defendants, Ellwood O. Wagenhurst, John E. Reyburn, and John K. Little duly docketed in the Court of Appeals, on the 27th day of April, 1903, the appeal which they had taken from the decree herein passed by this court on the 7th day of April, 1903, and their appeal is now pending awaiting hearing in the said Court of Appeals.

The order made herein by this court on the 4th day of May, 1903, was made at the instance of the solicitor for Elias Wineland, and without notice of any kind to either of the aforesaid defendants or their solicitors. The said order of May 4 was not a writ of execution to enforce compliance with any term or provision of the said decree of April 7th, no part of which decree contains anywhere a word imposing a duty in the premises upon the Treasurer of the United States who, in these proceedings, is an independent and impartial, though interested cus-

15 todian of the funds described in the said decree (which decree is now in the Court of Appeals for review), but the said order of May 4, is an order which sought, by new and affirmative action, founded on an *ex parte* application, to disturb the present safe possession of property while the cause which involves the own-

ership of the property is depending on appeal in the Court of Appeals. At the time of the passing of the decree of April 7, and at the time of the taking of the appeal from said decree the property constituting the subject matter of this litigation was in the custody of the Treasurer of the United States, invested in interest-bearing Government bonds, and the said Fields considering the attitude he had assumed at the Treasury Department and the request he had made of the department at the beginning of this suit, could not consistently ask the department to surrender possession of the funds in controversy pending the final determination of this cause. When this court, in June, 1902, in equity cause No. 21698, under the mandate which had come down from the Court of Appeals, signed the decree of dismissal which ended that cause, the Treasurer was ready to make settlement of the funds then due without reference to the said Wineland, and actually set about drawing his checks for such settlement, but the said Fields, having filed the original bill in this cause on the very day the mandate from the Court of Appeals in the former cause had been filed in this court, at once represented to the Treasurer that the litigation concerning the ownership of the said funds was not yet over, and asked that payment of the said funds be withheld until the end of the litigation. He represented that no hurt could come to either party by the Treasurer retaining the funds in interest-bearing bonds, and so earnest was he in the matter, going to the extent even of suggesting that the Government might have to pay a second time if it parted with the money before it knew who the true owner was, that the Treasurer referred the question of what should be done under the circumstances to the Comptroller of
16 the Treasury, the final revising officer of the accounts of the Treasurer. A formal hearing was had before the comptroller in which it was fully and earnestly urged by the said Fields that the department, having regard to its own interest not less than the interest of claimants of the fund, should retain the money in its own custody and await the final determination of every phase of litigation concerning the ownership of the fund before making payment. The attitude and request of the said Fields, if assented to by the department, could mean but one thing, to wit, that payment by the Treasurer should be withheld until the termination of litigation concerning the fund. Fields' own experience in connection with the former suit, equity No. 21,698, could give but one meaning to the request he was then making, if granted by the department. He had taken a properly authenticated copy of the decree of November 15, 1901, in Wineland's favor in equity cause, No. 21,698, and sought payment thereon at the Treasury Department immediately it was rendered; and, when the department reminded him that the litigation was not yet ended, but that an appeal had been taken to the Court of Appeals, he urged that the appeal bond in that case was not a supersedeas but a bond to cover costs only, and that the Treasurer would be fully justified, the decree not having been superseded pending the appeal, to act upon it, and, though he was importunate

in his efforts to obtain a settlement under the decree pending the appeal, he was unable to do so. The litigation, in the view of the department, was not yet ended, and the department declined to take any action with reference to the decree until the matter should be finally determined. Fully aware of the attitude and request of the said Fields at the Treasury Department when he was endeavoring to stay payment at the close of the former suit, and knowing the view entertained by the department concerning the pendency of litigation and the point at which it shall be regarded as having
17 terminated, these defendants, taking their appeal from the decree of April 7, ultimo, did not concern themselves to give a bond that should operate as a supersedeas, believing the department would continue to hold the funds to the end of the litigation, and knowing that the said Fields could not, with fairness and good faith, either to the department, whose discretionary action he had controlled, or to these defendants, who had acted with reference to the action of the department, ask the custody or possession of the funds to be changed pending a judicial review on appeal of the decree of April 7th; and, had these defendants, or their solicitors, had notice of the purpose of the said Fields to ask such an order as that of May 4, they would have represented to the court how such an application could not be made by him, consistently with his course and conduct at the Treasury Department in regard to the custody of the fund; but, deprived of their right to such a hearing before the making of the order of May 4, and not knowing but the Treasurer might think that such an order had been made with the consent of the defendants above mentioned, these respondents, Ellwood O. Wagenhurst and J. Altheus Johnson, felt it their duty, the one as a defendant herein and both of them as solicitors herein, to let the Treasurer know at once, the moment it came to their knowledge that such an order had been made, that it had been made without their knowledge or consent; that they would have strenuously resisted the making of it had they been allowed the opportunity; that the payment of the money into the registry of the court might imperil the interest of these defendants, since, if the money were in the registry of the court, the said Fields, as the solicitor for Elias Wineland, would set at once about making efforts to withdraw it from the registry of the court, on the ground that the decree of April 7 had not been superseded; and that the omission of these defend-
18 ants to make a supersedeas bond in connection with their appeal was the result of their belief that the department, in view of what had been said and done at the department concerning the said fund, would continue to hold the money to the end of the litigation.

The condition of the litigation between Elias Wineland and these defendants touching the ownership of the funds in controversy relieves these respondents of any element of contempt in what they said and did on the 5th inst. at the Treasury Department about the order which had been passed herein the day before.

In equity cause, No. 21,698, in this court, the original bill in which

was filed September 6, 1900, the said Wineland had sought, against these defendants, concerning the fund in controversy, the same relief which he prayed for in his bill in this cause (equity No. 23,352), filed June 7, 1902. In equity cause No. 21,698, by decree dated November 15, 1901, he was decreed the identical relief which he is now given in the decree of April 7, 1903, in this cause. Indeed, the two decrees, as to the relief granted, are almost *totidem verbis*. The decree of November 15, 1901, on appeal duly prosecuted to the Court of Appeals was reversed, and the said Wineland in that court was refused leave to come back and amend his bill in this court, and he was likewise refused in that court the request which he had made that the dismissal of his bill in that cause be declared to be "without prejudice;" and this court, in accordance with the mandate from the Court of Appeals in No. 21,698, on June 9, 1902, passed a decree in said cause finally and absolutely dismissing the bill of the said Wineland against these defendants. The bill in this cause, No. 23,352, filed in this court on the same day the mandate from the Court of Appeals in the other cause, No. 21,698, was filed, makes the same averments, with immaterial variations, and prays the same relief as did his bill in cause No. 21,698. To this second suit by
19 him brought against these defendants they filed their plea in bar thereof, setting up the former adjudication which had been had between the same parties, concerning the same subject matter, and in which the same relief had been sought as was now sought in this suit. When the plea thus filed came on for hearing, the justice before whom it came, seeing that it was not accompanied with a supporting answer, which he thought should have been made, at once, without looking into the merits of the defense set up in the said plea, though based upon the records of this court, overruled the plea and directed these defendants to answer. These defendants thereupon put in an answer, wherein they set out that the whole matter of the bill and the relief thereunder prayed was *res judicata* as between the said Wineland and these defendants, and insisted upon the former adjudication as a defense in bar of the present bill. To their answer thus made exceptions were filed, and, when the matter came on for hearing upon the exceptions, the justice before whom the hearing was had, seeing that the bill of complaint was divided into some forty-odd separately numbered paragraphs and that the answer contained but two paragraphs with numbering responsive to that in the bill and that it proceeded, without further responsive numbering of paragraphs, to set up the bar of a former adjudication as a defense "to the allegations contained in each and every of the remaining paragraphs of the said bill," at once, without considering at all the matter so alleged as a defense to "each and every of the remaining paragraphs of the bill," sustained the exceptions, and ordered the defendants to put in a sufficient answer. These defendants three times in this cause set up the former adjudication in their favor, made under the direction of the Court of Appeals of the District of Columbia, and sought the benefit thereof against further litiga-

tion, namely, they set it up in response to a rule issued
20 against them on the filing of the suit to show cause why they should not be enjoined *pendente lite* from collecting or receiving the moneys from the Treasury Department, and why a receiver of the said moneys should not be appointed. They set it up in their plea, and they set it up again in their answer. These respondents, thinking that the subject matter of this suit and the relief sought by Wineland with reference thereto had been fully, finally and meritoriously determined in the former suit, equity 21,698, and thinking that the said defendants had sufficiently put before the court in this cause their defense of *res judicata* based upon the records of this court, and knowing that the court, from oral words spoken during the progress of the cause, had not considered the merits of the question of *res judicata* as applied to this cause, and having regard to the former suit touching this same fund now in the Treasury Department in which the bill of complaint was in substauce identical with the bill of complaint in this cause and in which the decree of November 15, 1901, afterwards reversed by the Court of Appeals, is hardly, as to the relief granted, distinguishable by so much as a single word from the decree of April 7, 1903, which is now pending on appeal in the Court of Appeals, was declared by the Court of Appeals to be erroneous and Wineland adjudged to be without right in the premises, the Court of Appeals saying in connection with his claim to the funds now in the Treasury Department, "It is very clear that Moore (through whom Wineland claims title) had no greater authority over the affairs of the dissolved partnership than his co-partner Wagenhurst had. And both the partners having disposed of all their rights and interests in the retained repair fund, it would seem to be clear that Moore had no further power or authority to make the subsequent assignment to the complainant Wineland, and that the latter could take no right or title by that assignment to defeat the
21 just right and claims of the prior assignee, claiming by virtue of assignments of both the partners. The right- of both partners were extinguished in the funds attempted to be assigned, and were no longer subjects of assignment, under pretense of settling partnership affairs." (20 D. C. App., 95.)

These respondents, under the circumstances above recited, the decree of April 7, 1903, being at the time in the Court of Appeals, where it is now awaiting hearing, did not believe they were doing anything improper or disrespectful to the court, or a lawful decree thereof, when they went, on the 5th day of May, 1903, to the Treasury Department and spoke as they did with the Treasurer and the Comptroller of the Treasury about the custody of the funds described in the decree of April 7, 1903, the ownership of which is involved in the present litigation.

These respondents deny absolutely that the said funds would have been paid by the Treasurer into the registry of the court under the order of May 4 had these respondents not communicated with him. They do not believe the Treasurer would have made payment into

the registry of the court pending this litigation, no mandatory order by the court having been made upon him in the premises, and they deny that their acts and words influenced the Treasurer one way or another, unless it be that they eliminated from his mind any possibility of an idea that the order of May 4 had been made with the consent or concurrence of the defendants Wagenhurst, Reyburn and Little. The known and usual attitude of the department in regard to funds in its custody claimed by rival litigants, is to retain the money until the ownership has been finally settled, and the respondents deny that the communication addressed by the Treasurer to the said Fields referred to in paragraph 5 of the petition on which the present rule was issued, indicates any purpose to depart from
22 that attitude. These respondents at their interview with officials of the Treasury Department on May 5, 1903, were told of such a communication addressed to the said Fields, but they were also told that the communication did not mean that the money would be paid into the registry of the court even if such an order were obtained. These respondents were also told that the said Fields had been particularly insistent about obtaining such an order as justifying the department in parting with the funds, and the department, in view of his importunity, both in person and by letter, in that regard, had addressed him a communication which did not commit it to the doing of any particular act in the premises. The defendants Wagenhurst, Reyburn and Little not having had an opportunity in this court to make known their objections to a transfer of the custody of the property pending their appeal, and to show that it did not lie in the mouth of Elias Wineland, or of his solicitor, to make a request that the Treasurer of the United States should part with its custody pending the appeal, these respondents had the right, as they believed, in the light of this litigation and their connection therewith, to communicate with the Treasurer as they did, and in so communicating they disavow any purpose or intent in them, or either of them, to show contempt to this court, or to its lawful order properly made in the premises.

The 13th paragraph of the petition on which the rule was issued to which these respondents are now replying makes mention of another matter, but that paragraph is in error when it says that the respondent Johnson on May 7, 1903, in open court (before Mr. Justice Gould. equity No. 2), openly stated that the justice who had passed the decree of April 7, 1903, "had conducted his court in this case as a 'kindergarten.'" The facts are that the respondent Johnson, in discussing a motion then before the court, was asked by the court for a copy
23 of the decree of April 7, and the said Johnson furnished it to the court in a copy of the printed transcript of the record in this cause in the Court of Appeals. Mr. Justice Gould, noticing that the decree on its face purported to be a *pro confesso*, declared that he did not understand the proceedings in the cause. The respondent Johnson, in endeavoring to explain the situation, mentioned the fact that a plea had been filed by the defendants,

Wagenhurst, Reyburn and Little and that the plea had been overruled, not on a consideration of the matter it set up, but because it was said not to comply with a rule of court. He likewise mentioned the fact that an answer put in by the same defendants had been condemned, not on a consideration of its merits, but on the ground that it did not comply, as to the numbering of paragraphs, with one of the rules of the court. Counsel was expressing the idea that the various orders to which he was making reference had been made under an interpretation of the rules of court which had prevented a consideration of the case on the true and meritorious grounds of the controversy. And it was while speaking to that effect that the respondent Johnson used the words, "If your honor (Mr. Justice Gould) had happened in the court room and heard the comments of the justice when some of the orders herein passed were made, your honor might have supposed yourself in a kindergarten where counsel were being instructed in the rules of court." The remark as made about a kindergarten would reflect as readily upon counsel in the cause in need of such instruction as upon the court, but the fact is that counsel using the word had no intention of reflecting upon any one but only of expressing an idea he wished to convey, namely, that the merits of the defense sought to be set up herein had not been considered by the justice who made the decree of April 7, 1903, because the pleadings for the defense were said to lack compliance with some rule of the court.

24 The moment the respondent Johnson saw that the remark was liable to be interpreted as reflecting upon the justice who had made the orders, he at once apologized to the court for the remark, protesting that no reflection or disrespect was intended for any one, and certainly not for the distinguished justice who had so long sat upon the bench in this court and who had signed the various orders to which counsel had referred. Counsel had only made use of figurative language to assist in expressing the idea that rules of the court, and not the merits of the controversy, had led to the decree of April 7, 1903.

Wherefore, having answered as aforesaid, these respondents and each of them pray that the rule herein issued against them may be discharged.

J. ALTHEUS JOHNSON.
ELLWOOD O. WAGENHURST.

DISTRICT OF COLUMBIA, *ss:*

J. Altheus Johnson and Ellwood O. Wagenhurst, having been first duly sworn, depose and say that they are acquainted with the contents of the foregoing response by them made to a rule to show cause herein issued, and that the matters and things set forth in the said response, which is subscribed by them, are true, as they verily believe; and they add that they have personal knowledge of the various matters and things in the said response set forth.

J. ALTHEUS JOHNSON.
ELLWOOD O. WAGENHURST.

Subscribed and sworn to before me this 18th day of May, A. D. 1903.

J. R. YOUNG, *Clerk*,
By F. E. CUNNINGHAM, *Ass't Clerk*.

25 *Return of Ellis H. Roberts to Rule to Show Cause.*

Filed May 18, 1903.

In the Supreme Court of the District of Columbia.

ELIAS WINELAND
vs.
ELLWOOD O. WAGENHURST ET AL. } No. 23352. Equity.

Return to rule to show cause.

The defendant Ellis H. Roberts, Treasurer of the United States and *ex officio* commissioner of the sinking fund of the District of Columbia, for cause why he should not be required to pay or deliver to complainant or into the registry of this court for the use and benefit of complainant the moneys and bonds in his hands involved in this suit, as prayed in complainant's petition, respectfully shows:

1. That it appears in and by the bill of complaint in this cause that this defendant is sued as a public officer of the Government of the United States and concerning matters arising out of and within his duty and employment as such public officer and not in any manner in his private character as an individual.

2. That from the final decree in this cause of April 7, 1903, an appeal has been prosecuted by the defendants Wagenhurst, Reyburn and Little to the Court of Appeals of the District of Columbia, and is now pending undetermined in said Court of Appeals.

3. That from the final order passed in this cause on May 4, 1903, authorizing this defendant to pay said moneys and bonds into the registry of this court, and from the order passed on
26 May 7, 1903, overruling the motion to vacate said order of May 4, 1903, an appeal has been noted by said defendants Wagenhurst, Reyburn and Little to said Court of Appeals, and this court has fixed the penalty of the bond on said appeal for costs and to operate as a supersedeas.

This defendant denies the allegations of the tenth paragraph of said petition that owing solely to the personal interference and intermeddling of the respondents, Wagenhurst, Reyburn and Little and their solicitors, this defendant has declined and still declines to pay said bonds and money into the registry of this court in accordance with said order of May 4, 1903, and that otherwise he would have paid and delivered the same into the registry of this court; and says that the fact is that upon receipt of a copy of said last mentioned order he was preparing to submit the matter to the

Comptroller of the Treasury for advice as to his action when he received a copy of the order of this court of May 7, 1903, fixing the bond in the appeal from said orders of May 4, and May 7, 1903.

Wherefore this defendant says that this court should not pass an order directing him to pay said bonds and money to the complainant or into the registry of this court for complainant's use and benefit.

ELLIS H. ROBERTS,
Treasurer of the United States.

MORGAN H. BEACH,
U. S. Attorney, D. C., Solicitor for Def't Ellis H. Roberts.

DISTRICT OF COLUMBIA, *ss:*

I, Ellis H. Roberts, on oath, say that I read the foregoing return by me subscribed and know the contents thereof; that the facts stated therein of my own knowledge are true, and that those stated upon information and belief are true.

ELLIS H. ROBERTS.

Subscribed and sworn to before me, this 18 day of May, A. D. 1903.

[NOTARIAL SEAL.] HIRAM W. BARRETT.

27 *Order Adjudging E. O. Wagenhurst and J. A. Johnson in Contempt.*

Filed May 18, 1903.

In the Supreme Court of the District of Columbia.

ELIAS WINELAND
v.
ELLWOOD O. WAGENHURST ET AL. } Equity. No. 23352.

This cause came on to be heard upon the petition of the complainant for an order adjudging the respondent Ellwood O. Wagenhurst and his solicitor J. Altheus Johnson in contempt of this court, and upon their return to the rule issued upon the said petition on May 11, 1903; and after argument by counsel and consideration by the court, it is, this eighteenth day of May, A. D. 1903, hereby adjudged and ordered, that the said J. Altheus Johnson and Ellwood O. Wagenhurst are in contempt of this court for violation by them of the injunction clause of the final decree passed in this cause on April 7, A. D., 1903, and for such violation and contempt each of them is hereby fined in the sum of twenty dollars ($20.00) and costs of this proceeding.

It is hereby further adjudged and ordered that the said J. Altheus Johnson is in contempt of this court for the statement made by him

on May 7, A. D., 1903, as recited in the said petition, and for such contempt he is hereby fined in the sum of ten dollars ($10.00).

It is hereby further adjudged and ordered that the said Ellwood O. Wagenhurst and J. Altheus Johnson and each of them stand committed until the said fines and costs be paid.

By the court:

A. B. HAGNER,
Asso. Justice.

Endorsed: May 18, 1903. Satisfied in full. Aulick Palmer, U. S. marshal D. C.

28 *Order Requiring Payment of Money into Registry.*

Filed May 22, 1903.

In the Supreme Court of the District of Columbia.

ELIAS WINELAND
v.
ELLWOOD O. WAGENHURST ET AL. } Eq. 23352.

This cause again came on to be heard upon the petition of the complainant filed herein on May 12, 1903, and the rule issued thereon on the thirteenth day of May, 1903, and the answer of the respondent Ellis H. Roberts to the said petition and rule; and after argument by counsel for the complainant and the said respondent, and consideration by the court, it is, this twenty-second day of May, 1903, ordered that the said Ellis H. Roberts, Treasurer of the United States and *ex-officio* commissioner of the sinking fund of the District of Columbia, be and he hereby is required and directed forthwith to pay or deliver into the registry of this court, through its clerk, (there to remain, subject to the further order of this court in the premises), all of the moneys and bonds and interest awarded to the complainant Elias Wineland by the final decree passed in this cause on April 7, 1903; and such payment or delivery of the said moneys and bonds and interest by the said Ellis H. Roberts to the clerk of this court shall be a full, complete and absolute acquittance, release and discharge of the said Ellis H. Roberts for the whole and every part of the said moneys and bonds and interest, and shall constitute an absolute bar to any proceedings against him for or on account of the same.

By the court:

A. B. HAGNER,
Asso. Justice.

29 From the foregoing order the said Ellis H. Roberts notes an appeal in open court.

Appeal Noted, and Fixing of Bond Requested.

Filed May 22, 1903.

In the Supreme Court of the District of Columbia.

ELIAS WINELAND
vs.
ELLWOOD O. WAGENHURST ET AL. } No. 23352, Equity Doc.

Come now the defendants, Ellwood O. Wagenhurst, John E. Reyburn, and John K. Little, by their solicitors, and showing to the court that they have an appeal herein duly taken on May 7, 1903, from the order herein of May 4, 1903, which authorized the United States Treasurer to pay the funds in his possession into the registry of the court, and that the amount of the bond for said appeal to cover costs and to operate as a supersedeas was duly fixed by order of the court herein made on May 7, 1903; and showing also, from matter on the files of the court in this cause, to wit, the response of J. Altheus Johnson and Ellwood O. Wagenhurst herein filed on May 18, 1903, in answer to a rule to show cause herein issued on May 11, 1903, that the complainant herein is not in a position, in equity and good conscience, to have requested this court to make an order whereby the possession of the property in controversy would be changed pending the determination of the appeal which is now being prosecuted from the decree herein made on April 7, 1903, they, the defendants aforesaid, in open court, note an appeal to the Court of Appeals of the District of Columbia from the order herein this day made (May 22nd, 1903), commanding the Treasurer of
30 the United States to deliver forthwith into the registry of the court, the moneys, bonds and interest described in the decree of April 7, 1903, the said decree having contained nothing whatever as to said moneys, bonds and interest in any wise binding or obligatory upon the Treasurer of the United States in whose safe custody the said moneys, bonds and interest were at the time of the making said decree and still are.

And at the same time, in open court, in the presence of counsel for the complainant herein, they, the defendants aforesaid, by their solicitors, ask the court to fix the penalty of a bond to be given by them, the said defendants, to cover the costs of the said appeal and also to operate as a supersedeas of the said order this day made.

And thereupon it is, by the court, this — day of May, A. D., 1903, further ordered that the penalty of the bond for the appeal so noted be, and the same hereby is, fixed at $—.

——— ———,
Associate Justice.

Order Allowing Special Appeal.

Filed May 25, 1903.

In the Court of Appeals of the District of Columbia, April Term, 1903.

No. 159, Original Docket.

ELLWOOD O. WAGENHURST, JOHN E. REYBURN, and John K. Little, Petitioners, *vs.* ELIAS WINELAND. } Equity. No. 23352.

On consideration of the petition of Ellwood O. Wagenhurst, John E. Reyburn and John K. Little, for the allowance of a
31 special appeal from an order of the supreme court of the District of Columbia, entered herein on the 22d day of May, A. D. 1903, it is now here ordered by the court, that said appeal be, and the same is hereby, allowed, and supersedeas bond is fixed at the sum of five hundred dollars.

M. F. MORRIS,
SETH SHEPARD,
Associate Justices.

May 25, 1903.

A true copy.
Test:
[SEAL OF COURT.]

ROBERT WILLETT, *Clerk*,
By H. W. HODGES,
Assistant Clerk.

Notice for Approval of Appeal Bond.

Filed May 25, 1903.

In the Supreme Court of the District of Columbia.

ELIAS WINELAND *vs.* ELLWOOD O. WAGENHURST ET AL. } No. 23352, Equity Doc.

Take notice: That the appeal bond herein made by the defendants Wagenhursn, Reyburn and Little on their appeal herein taken from the orders of May 4, 1903, and May 7, 1903, will be submitted for approval to Mr. Justice Hagner, or whatever justice may then be acting in equity matters, on Tuesday, May 26, 1903, at ten o'clock a. m., or as soon thereafter as counsel can be heard. The surety

on the said bond is the National Surety Company, of New York, whose office and place of business in this city are rooms Nos.
32 — in the Washington Loan and Trust bldg., Ninth and F streets northwest, Washington, D. C.

J. ALTHEUS JOHNSON,
ELLWOOD O. WAGENHURST,
Solicitors for Defendants.

To Mr. Thomas M. Fields, solicitor for complainant.

May 22, 1903.

DISTRICT OF COLUMBIA, *ss:*

J. Altheus Johnson, on oath, says he served a copy of the foregoing notice upon Thomas M. Fields on May 22, 1903.

J. ALTHEUS JOHNSON.

Subscribed and sworn to before me, this 26th day of May A. D. 1903.

J. R. YOUNG, *Cl'k,*
By F. E. CUNNINGHAM, *Ass't Cl'k.*

Memorandum.

Appeal bond on orders of May 4 and 7, 1903, approved and filed May 26, 1903.

Memorandum.

Appeal bond on order of May 22, 1903, filed May 27, 1903, and approved May 28, 1903.

33 *Order for Transcript of Record on Special Appeal.*

Filed Jun- 6, 1903.

In the Supreme Court of the District of Columbia.

ELIAS WINELAND
v.
ELLWOOD O. WAGENHURST ET AL. } Equity. No. 23352.

Order for transcript.

The clerk of the court will make the transcript of the record for the special appeal allowed by the Court of Appeals of the District of Columbia from the order herein passed on May 22, 1903, and he will put into the transcript for the said appeal the following matter, namely:—

1. The caption, the second paragraph and the prayers of the original bill.

2. The final decree of April 7, 1903.

3. The order of April 8, 1903, allowing an appeal from the decree of April 7, 1903, and fixing the amount of the bond for such appeal, and also a copy of the bond executed for that appeal.

4. The order of May 4, 1903, which authorized the United States Treasurer to pay the funds into the registry of the court.

5. The motion of May 6, 1903, to vacate the order of May 4, 1903.

6. The two orders of May 7, 1903, one overruling the motion to vacate the order of May 4, the other fixing the bond for the appeal from the order of May 4.

7. The rule to show cause issued May 11, 1903, against J. Altheus Johnson and Ellwood O. Wagenhurst.

34 8. The rule to show cause issued May 13, 1903, against the United States Treasurer.

9. The response filed May 18, 1903, of J. Altheus Johnson and Ellwood O. Wagenhurst to the rule of May 11, 1903.

10. The response, filed May 18, 1903, of the United States Treasurer to the rule of May 13, 1903.

11. The order of May 18, 1903, showing the action of the court on the rule of May 11, 1903.

12. The order of May 22, 1903, showing the action of the court on the rule of May 13, 1903.

13. The appeal noted by Wagenhurst, Reyburn and Little from the order of May 22, 1903, and the request (not granted) which they made of the court to fix the penalty of a bond to be given by them on the appeal so noted.

14. The order on file from the Court of Appeals allowing a special appeal from the order of May 22, 1903.

15. The notice, filed May 25, 1903, of application for approval of the bond given on the appeal of May 7, 1903, and show in a memorandum the date such bond was approved. Also make a memorandum to show the date the bond given upon this special appeal from the order of May 22, 1903, was filed, as also the date it was approved.

J. ALTHEUS JOHNSON,
ELLWOOD O. WAGENHURST,
Solicitors for Wagenhurst, Reyburn, and Little.

35 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, *District of Columbia,* } *ss:*

I, John R. Young, clerk of the supreme court of the District of Columbia, hereby certify the foregoing pages, numbered from 1 to 34, inclusive, to be a true and correct transcript of the record, as per directions of counsel herein filed, copy of which is made part of this record, in cause No. 23,352, equity, wherein Elias Wineland is

complainant, and Ellwood O. Wagenhurst, *et al.*, are defendants, as the same remains upon the files and of record in said court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said court, at the city of Washington, in said District, this 18″ day of June, A. D. 1903.

Seal Supreme Court of the District of Columbia.

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia supreme court. No. 1339. Ellwood O. Wagenhurst *et al.*, appellants, *vs.* Elias Wineland. Court of Appeals, District of Columbia. Filed Jun- 20, 1903. Robert Willett, clerk.

IN THE

Court of Appeals of the District of Columbia.

OCTOBER TERM, 1903.

No. 1339.

ELLWOOD O. WAGENHURST *et al.*

v.

ELIAS WINELAND.

BRIEF FOR APPELLANTS ON SPECIAL APPEAL.

STATEMENT OF THE CASE.

This is a special appeal from an order of May 22, 1903 (p. 19, of printed Rec.), made in an Equity branch of the Supreme Court of the District of Columbia, directing the Treasurer of the United States to pay into the registry of the Court certain funds, of which he was the custodian provided by law, but which, as to their ownership, had been, and still were, the subject of litigation. That order depended upon a decree which had been made by the same Court on April 7, 1903 (p. 3, ditto), which decree was at the time in this Court for review, having been docketed here April 27, 1903, as cause No. 1310. The appeal from the order of May 22, 1903, was docketed in this court June 20, 1903, as cause No. 1339. On June 25, 1903, this court passed upon cause No. 1310 and reversed the decree of April 7, 1903.

The order of May 22 (from which the present appeal was taken), of course fell with the decree of April 7, 1903, out of which it grew and to which it clung as a parasite. There is, therefore, now no real interest hinging upon this appeal, the

costs of the appeal being all that remains undisposed of. It is proper that they, along with the other debris of the decree of April 7, be accounted among the losses of the party responsible for the litigation which culminated in that decree.

Assignment of Errors.

The order of May 22 was manifestly and egregiously wrong:

1. Because it was an effort at execution against the Treasurer of the United States, a person against whom the decree of April 7 did not authorize execution, and against whom no relief had been prayed in the bill or adjudged in the final decree.

2. Because it was an effort, while litigation was pending, to change the custody of property to the detriment of one of the parties to the litigation, the custody in which the property then was being absolutely safe, and the one which the law had provided.

3. Because it was an effort by Elias Wineland and his attorney, not justified by the circumstances of the case, to get the subject-matter of the litigation in a place (as they openly avowed their purpose to be) where they could ask concerning it that the terms of the decree of April 7 be enforced—a decree which this Court has said was erroneous.

4. Because it was violative of the rights of these appellants in the premises, who, in taking their appeal from the decree of April 7, were justified in believing that no improper, illegal or unusual methods would be adopted to execute the said decree pending their appeal therefrom.

5. Because it was not competent for Wineland to make forcible execution of the decree of April 7 upon the Treasurer of the United States, whose care and custody of the property in dispute, not derived from the Court, but existing independently of this litigation, had not been terminated by the said decree; and it was competent for these appellants, in the prosecution

of their appeal from that decree, to consider that fact and rely upon it, to wit, the fact that the subject-matter of the litigation was in a custody, safe from execution, where it would be retained until the validity of the decree of April 7 could be ascertained.

The decree of April 7 (upon which the order of May 22 was based) did not impose any duty or obligation whatever in the premises upon the Treasurer of the United States, who, being the custodian provided by law for the funds to which Wineland was making claim, was perfectly free (so far as the said decree was concerned, or the litigation of which it was a part) to hold the funds until he (the Treasurer) should regard that the proper time had come to pay them over, consideration being had by him, if need be, to the rights of persons whom Wineland, the claimant in the present litigation, had omitted to bring before the Court. Nothing in the bill, either in its allegations or its prayers, imposed any duty upon the Treasurer to mix in any manner in the litigation, even to the extent of disclosing to the Court the names of persons, who, outside of the ones named by Wineland in his bill, were asserting ownership of the funds in question (and at least one such is still claiming at the Department by an assignment paramount to the assignment set up by Wineland). All that the bill prayed for as against the Treasurer was that he should furnish to the Court copies of certain letters which had passed between him and certain of the defendants. That correspondence was furnished and the Treasurer had no further concern about the cause, so far as it was to affect him, and the entry against him of a *pro confesso* was, under the circumstances, wholly meaningless and useless. If the Treasurer, under the decree of April 7, had so desired, he could doubtless have asked from the Court authority to relieve himself of the funds in controversy and to refer all claimants to the Court into whose registry he had paid the funds. The Court did make an order on May 4, 1903 (p. 6, ditto), authorizing the Treasurer to

pay into the registry of the Court. That order (which was made on the oral ex parte representation of counsel to the justice who signed it that the Treasurer wished such an order in the case) is the utmost extent to which the Court, under the bill herein and the decree of April 7, could go in an endeavor to disturb the custody of the property while in the hands of the Treasurer. The peremptory order upon him of May 22 (p. 19, ditto), from which this appeal is prosecuted, passes legal comprehension. The Court with authority to make that order must have authority also to commit to jail for non-compliance with its terms. The Treasurer of the United States in jail for disregarding a process of execution issued against him in this cause!!!

It can hardly be to the discredit of these appellants that they believed, concerning the decree of April 7, that no execution was possible which had as a consequence so serious a result as the incarceration in a common jail of the United States Treasurer, whose function is a most important one in the fiscal business of the country. And to think that against so dire a result these appellants might have guarded by a simple change of phraseology in their appeal bond!! They knew when they took their appeal from the decree of April 7 that the Treasurer expected to keep the funds in controversy in his own hands until this court had passed upon their appeal; and still it did not occur to them that a supersedeas clause in their appeal bond was necessary to keep the United States Treasurer out of jail!

J. ALTHEUS JOHNSON,
ELLWOOD O. WAGENHURST,
For the Appellants.